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Supreme Court of the United States

OCTOBER TERM, 1956

No. 310

FOURCO GLASS COMPANY,
PETITIONER,

v.

TRANSMIRRA PRODUCTS CORP. AND
ROBERT ARONSTEIN,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

Question Presented

Should not "resides" in §1400(b) of the revised Judicial Code of 1948 be read with the general definition of corporate "residence . . . for venue purposes" in §1391(c), so as to authorize this patent infringement suit brought in a judicial district where defendant corporation was "doing business"?

Summary

Section 1400(b) of the 1948 Judicial Code makes venue in patent infringement suits proper where a defendant "resides" (and also, as a second alternative, "where the defendant has committed acts of infringement and has a regular and established place of business.") The first section of the same chapter defines "the residence of [a] corporation for venue purposes" as any judicial district in which it "is incorporated or licensed to do business or is doing business." §1391(c), under heading "Venue generally". Thus §1400(b), read with the definition of "resides" given in the introductory section, as a matter of plain language authorizes this suit.

This plain language effects for patent venue the same modernization clearly effected in general venue by §1391: it permits suits against corporations on the realistic and fair "doing business" basis. Every reason favoring general venue on this basis favors patent venue so, as was recognized at the time the Code was enacted. And unless §1400(b) is read with the definition in §1391(c), a defendant corporation is immune from suit where it is not only doing business, but is infringing widely as well, a result quite out of step with present-day standards of fairness. For patent suits as for suits generally, policy favored resolving the conflicts under *Neirbo* by substituting the modern "doing business" test for the unrealistic "waiver" approach.

That policy favored liberalizing patent venue commensurately with general venue finds strong support in history. One main purpose expressed by Congress in enacting the Act of 1897 (the first special patent venue statute) was to broaden patent venue to facilitate suits against infringing corporations. That Act clearly did broaden patent venue relative to the then-applicable general venue statute; and

Congress preserved patent venue broader than general (to the extent of the "second alternative," *supra*, p. 2) from that date until at least 1948. Widespread misunderstanding of this history seems mainly responsible for the decisions not giving effect to the plain language of §§1400(b) and 1391(c).

The natural reading of those sections is strongly supported by other provisions of the code of which they are part. The curing of any venue abuse is facilitated by new §1404(a), which has only recently been held to make the new remedy of transfer available on a lesser showing than was required for dismissal for forum non conveniens. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955). (That this section is applicable in patent infringement suits seems clear from two decisions very closely analogous on the question at bar: *Ex parte Collett*, 337 U.S. 55 [1949]; *United States* v. *Nat. City Lines*, 337 U.S. 78 [1949]). Declaratory judgment suits (under Ch. 251 of the code) against a patent owner involve the same issues as suits for patent infringement; yet §1391(c) is applicable. Unfair competition and patent infringement issues may be closely related, as is emphasized by new dependent jurisdiction §1338(b), but in the ordinary unfair competition suit §1391(c) is applicable. Section 1400(b) should be read as what it is:—one of several special sections following, and using a word defined in, a general definition section.

Although recourse to legislative history is unwarranted, further support is there found for giving the sections their apparent meaning. Three strong legislative purposes were to improve and modernize, including specifically venue (and much material including law review articles and widely solicited suggestions were collected pursuant to this purpose); to resolve conflicts; and to make the code clear in meaning (to even "the average intelligent citizen", it was said hopefully). But the modern approach to defendant

corporate venue is the "doing business" one; and substantial conflict as to the impact of *Neirbo* existed with respect to patent venue as well as general. Effect is given the first two purposes by the language of the statute, which resolves the *Neirbo* conflict by making applicable the modern "doing business" test. And obviously the purpose that the code be clearly understandable is frustrated unless it is given its plain meaning.

The reviser's notes by a cross-reference suggest that §1400(b) and 1391(c) should be read together, though reference to these notes seems unwarranted, they being much more ambiguous here than the statute itself. Although there are in the legislative history expressions of a purpose to point out, in the reviser's notes, changes in the statute, the purpose seems to have been more to point out changes in text than in legal consequence. The liberalization clearly effected in general venue by §1391(c) is not pointed out as such in the reviser's notes. It seems not surprising thus that a corresponding change in the patent venue section, which is of much narrower applicability, was not explained in the reviser's notes as such. Of course the reviser's notes under both sections do point out the changes in text, and are actually cross-referenced with respect to "resides" and "residence".

The broadening of patent venue found by the court below was not such a "controversial substantive change" as the revisers expressed a purpose to avoid (e.g., elimination of diversity jurisdiction or revising the laws of peonage and international crimes).

The plain language of the statute is further supported by the better reasoned decisions of the lower federal courts (including the only two unanimous Court of Appeals decisions), by the legal writers generally, and by the decisions under other special venue sections, both in and out of Title 28.

Stonite Co. v. *Melvin Lloyd Co.*, 315 U.S. 561 (1942) is not authority that the plain language of the patent venue section should be ignored. That case decided only that a section expressed as an exception to a general venue section then clearly inapplicable to patent venue was not itself applicable to the patent venue section, which in no way referred to it. Also, *Stonite* has unfortunately been misinterpreted as authority for a mistaken view that Congressional intent had in the 1897 Act favored a relatively restrictive patent venue.

Reading §1400(b) with §1391(c) does not "emasculate" the second alternative of the former:—that provision applies to individuals and partnerships, and is necessary to preserve for them the relatively broader patent venue which has existed since 1897. Similarly, the special patent process §1694 remains meaningful for individuals and partnerships. That section, which originated together with §1400(b) in the 1897 Act, is clearly supplemented by the service of process provisions of Federal Rule 4, which is not even referred to; this seems still further support for reading the special patent venue section with a literally applicable definition section, under all the foregoing circumstances.

The Clear Language of the Statute Supports The Judgment Below

The 1948 Judicial Code[1] in §1400(b)[2] authorizes suit for patent infringement where a "defendant resides". The

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[1] Title 28, United States Code, Act June 25, 1948, c. 646, 62 Stat. 869.

[2] "§ 1400. Patents and copyrights

"(b) Any civil action for patent infringement may be brought in the judicial district *where the defendant resides*, or where the defendant has committed acts of infringement and has a regular and established place of business."

(Emphasis ours throughout this brief unless otherwise noted.)

first section under the same chapter (which deals with "[v]enue generally"), includes § 1391(c),[3] defining the "residence of [a] corporation for venue purposes" as, *inter alia*, "any judicial district in which it is . . . doing business".

It could hardly be clearer that as a question of plain language, the statute authorizes this suit.

The court below thus properly concluded (R. 6-7) that "the plain meaning of the two statutes, when read together, would be that this defendant may be sued in New York, where it 'is doing business.'"[4] As Chief Judge Hutcheson said for the court in *Dalton* v. *Shakespeare Co.*, 196 F.2d 469, 472 (5 Cir. 1952), a leading decision in accord with that of the Court below:

> "Indeed it seems to us that the difficulties arise not out of the words the statute used but out of the strained effort to make them read otherwise than as they do."

The Clear Language of the Statute Implements A Sound Modern Venue Policy

General Venue Was Clearly Broadened

Section 1391(c) provided substantially broadened venue against defendant corporations in actions generally,[5] re-

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[3] "Chapter 87—District Courts; Venue

* * *

"§ 1391. Venue generally

* * *

"(c) *A corporation may be sued in any judicial district in which it is* incorporated or licensed to do business or is *doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.*"

[4] Petitioner (defendant) does not deny "doing business" in New York (Pet. Br. 3).

[5] Note, "The Proposed Revision of the Federal Judicial Code", 60 Harv. L. Rev. 424, 434 (1947); *Barber-Greene Co.* v. *Blaw-Knox Co.*, 112 U.S.P.Q. 73, 74-75 (6 Cir. 1957). See also cases cited *infra* pp. 32, 33. Petitioner's statement that § 1391(c) was "commensurate with the law as it existed" under *Neirbo* (Pet. Br. 18) is not accurate.

solving at the same time conflicts under *Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165 (1939)[6]. As Judge Phillips conceded in *Ruth* v. *Eagle-Picher Company*, 225 F.2d 572, 577 (10 Cir. 1955) (2-1):

> "The phrase in subsection (c), 'or is doing business,' extends the philosophy of [*Neirbo*] to the act of doing business."

As to this change in venue law, which Judge Clark below properly referred to as one of the "important changes" (R. 9) worked by the Judicial Code of 1948, he said:

> "The rationale of this sharp break with ancient formulae is quite obviously a response to a general conviction that it was 'intolerable if the traditional concepts of "residence" and "presence" kept a corporation from being sued wherever it was creating liabilities.' See the Note cited *supra*, 56 Col. L. Rev. 394, at 395 (1956). As this authority points out, the particular attack on the problem here is in terms of venue, with which is allied the issue of personal jurisdiction over corporations. But, as we know, the ramifications are yet more general; for there have long been debated proposals to substitute for the famous fiction making a corporation a citizen or inhabitant of the perhaps remote state of its incorporation the more realistic test for substantive jurisdiction itself of the place or places of corporate activity or doing business.

[6] *Neirbo* had decided only that in a diversity case, a defendant had waived its venue privilege by a prior general designation of an agent for service of process. "Uncertainties as to the scope of the decision abounded." Hart & Wechsler, "The Federal Courts and the Federal System" (1953), p. 958, in which some of these uncertainties are noted. See also Comment, "The Aftermath of the Neirbo Case", 42 Ill. L. Rev. 780 (1948).

See Frankfurter, J., in *Lumbermen's Mutual Casualty Co.* v. *Elbert*, 348 U.S. 48, 56, discussing, *inter alia*, the proposals of that distinguished lawyer and statesman, the late Attorney General Mitchell; and see in detail, McGovney, *A Supreme Court Fiction*, 56 Harv. L. Rev. 853, 1090, 1225, 1231-1238, 1251, 1252 (1943). So extensive has been the dispute, so voluminous the literature, that even partial steps to correct what has been so thoroughly and exhaustively condemned as unjust would seem deserving of support."

Section 1391(c) thus, in a sense, adopted for federal courts the philosophy of *Internat. Shoe Co.* v. *Washington*, 326 U.S. 310, 320 (1945), that suit against a foreign corporation is proper where "reasonable and just, according to our traditional conception of fair play and substantial justice. . . ."[7] The modern approach, under §1391(c) and other sections of the 1948 Code, and the policy underlying that approach, was stated in *Polizzi* v. *Cowles Magazines*, 345 U.S. 663, 669-670 (1953):[8]

"A large part of the business in each and every state is done today by corporations created under the laws

[7] This "fairness" approach has since been applied flexibly in several decisions permitting suit against corporate defendants. *Travelers Health Assn.* v. *Virginia*, 339 U.S. 643 (1950); *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437 (1952). While the narrow issue of these and the *International Shoe* cases was due process, the same criterion of fairness applies when the issue is whether defendant is "doing business", for purposes of federal jurisdiction or venue. "[T]he rationale of the 'fair play and substantial justice' doctrine as set forth in International Shoe Co. v. State of Washington, etc., supra, extends over into the consideration of the suability of foreign corporations under Acts of Congress." *Green* v. *U. S. Chewing Gum Mfg. Co.*, 224 F.2d 369, 372 (5 Cir. 1955). *Accord*: *Krnach* v. *Electro Lift*, 13 F.R.D. 131 (N.D. Ohio 1952); *Allegue* v. *Gulf & South American S. S. Co., Inc.*, 103 F. Supp. 34 (S.D. N.Y. 1952).

[8] Mr. Justice Black, with whom Mr. Justice Jackson joined, concurring in part and dissenting in part.

of other states. To adjust the practical administration of law to this situation the Court in recent years has refused to be bound by old rigid concepts about 'doing business.' Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness. . . ."

POLICY SUPPORTS CORRESPONDING BROADENING OF PATENT VENUE

Every reason of policy favoring suits against corporate defendants generally applies with at least equal force in patent infringement suits. Indeed, (*infra*, pp. 11-18), *historically the policy of Congress has consistently been to provide for broader venue in patent cases than in cases generally.* As Judge Clark said, following the language just quoted (*supra*, p. 7) (R. 10):

> "*No reason appears, therefore, why we should strain to discover unexpressed exceptions to this beneficial principle* [embodied in sec. 1391(c)], *which could so easily have been expressed, had they been intended.* Moreover, recognition of such exceptions is unreasonable, since all the grounds supporting the general rule appear fully as applicable to all the special cases including patent infringement."

In *Shelton* v. *Schwartz*, 131 F.2d 805, 809 (7 Cir. 1942), a patent infringement suit in which defendant had not been licensed to do business in the district, Judge Evans had said for the court shortly before revision of the Judicial Code began:

> "While the recent case of *Neirbo Co.* v. *Bethlehem Company*, supra, can be readily distinguished so far as the specific issue is concerned, the discussion there-

in, the implication of its holding, as well as the dissent, can not be ignored. The day of the foreign corporation's avoidance of liability to local residents with whom it has transacted business seems to be about over."

The modern approach permitting suit where a corporation is creating liabilities does not limit suit to the district in which the *particular* liability was created. *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437 (1952).[9]

Furthermore, to hold in accordance with petitioner's contention that venue over a non-domiciliary corporation requires that it *both* have a "regular and established place of business" and have infringed in the district, would prevent suit in districts where corporate defendants were doing business and infringing widely,[10] a result quite out of step with present-day standards of fairness.[11]

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[9] Of course, whether a particular cause of action arose in the district is one factor bearing on whether the defendant is doing business there for purposes of the particular suit.

[10] With current national distribution techniques it seems reasonable to expect that infringement is more likely to be found in a particular state than is a "regular and established place of business."

[11] As the court said in *Kahn* v. *Maico Company*, 216 F.2d 233 (4 Cir., 1954), in finding that defendant was "doing business" so as to be subject to process under a Maryland statute (p. 237): "[This result] is in accord, also, with the sound public policy that foreign corporations engaging in business in a state either directly or through others should be subject to the jurisdiction of its courts, so that citizens of the state having claims arising out of such business may not be required to resort to the courts of an alien and distant jurisdiction to obtain justice." To the same general effect were, e.g., *Smyth* v. *Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951) and *Jenkins* v. *Doll Publishing Company*, 132 F. Supp. 556, 557 (W. D. Pa. 1955). In *Travelers Health Assn.* v. *Virginia*, 339 U.S. 643 (1950) the majority of this Court held that Virginia could compel a Nebraska insurance company to accept service of process on claims arising out of its Virginia activities, despite the fact that it had no paid sales or other representative in Virginia; "its new members are usually obtained through the unpaid activities of those already members, who are encouraged to recommend the Association to friends and submit their names to the home office." (p. 646)

Consistent Congressional Policy Historically of Broader Venue in Patent Cases Heavily Supports the Clear Statutory Language

Doubtless the strongest argument[12] seemingly cutting against the judgment below is grounded on the view that the prior special patent venue statute was originally enacted as a restrictive measure designed to curb abuses resulting from applicability of broader general venue provisions; and codification should not be permitted to change the rule to defeat this supposed policy. Even *Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), heavily relied on by petitioner, and the cases supporting its position, seem to have been thought relevant primarily as reflecting and supporting this supposed legislative purpose. The cases holding contrary to the court below relied heavily on this argument which permeates petitioner's brief (E.g., Pet. Br. 4, 6).

Yet, incredible as it may appear at first blush, *this argument is without merit,* as a critical evaluation of history, legislative and otherwise, makes clear.

From 1789 until 1887, general (including patent) venue was proper wherever a defendant was either an "inhabitant" or "found." In 1887 a restrictive *general venue* statute was passed, which (both as originally passed and as corrected in 1888)[12a] made venue proper only where defendant was an "inhabitant." (It was *this* statute, and not the later first special patent venue act, *infra,* which this court referred to in *Stonite* as prompted by "abuses engendered by [the] extensive venue" under the prior general venue statute. 315 U.S. 561, 563 (1942).) For a

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[12] Note, "Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts," 56 Col. L. Rev. 394, 413 (1956).

[12a] Act of March 3, 1887, c. 373, 24 Stat. 552 (amended by Act of August 13, 1888, c. 866, 25 Stat. 433).

detailed discussion of this history, with citation to the statutes involved see *Shaw* v. *Quincy Mining Company*, 145 U.S. 444 (1892).

At first the lower federal courts were apparently unanimous in treating the 1887 Act (as amended) as applicable to patent suits. *Stonite*, 315 U.S. 561, 564 (footnote 3). What followed is well summarized in *Stonite*, pp. 564-5 (citing cases in a footnote):

> "After the holding of *In re Hohorst*, 150 U.S. 653, that the Act of 1887 as amended did not apply to a suit against an alien or a foreign corporation, 'especially in a suit for the infringement of a patent right,' the lower federal courts became uncertain as to the applicability of the Act of 1887 to patent infringement proceedings. In explanation of *Hohorst's* case, it was said in *In re Keasbey & Mattison Co.*, 160 U.S. 221, 230, that 'It was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the Circuit Courts of the United States . . .; and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several States.' Thereafter the lower federal courts, for the most part, took the position that the Act of 1887 as amended did not apply to suits for patent infringement, and that infringers could be sued wherever they could be found."

As to this phase of the history generally, see also *Bowers* v. *Atlantic, G. & P. Co.*, 104 Fed. 887 (C.C.S.D.N.Y. 1900) (Pet. Br. 7).

In this context Congressman Lacey introduced (29 Cong. Rec. 1418 (1897)) H. R. 10202, 54th Congress, 2nd Session, which resulted in the Act of March 3, 1897, c. 395, 29 Stat.

695,[13] which for the first time in this country's history made special provision for patent suits. The bill was reported (29 Cong. Rec. 1755 (1897)) favorably for the Committee of Patents by Mr. Mitchell, who read from the report [14] the following expression of the purpose of the bill (29 Cong. Rec. 1900):

> "This bill seeks to define the jurisdiction of the courts in patent suits and to remove the uncertainty which now arises as to such jurisdiction by reason of the conflicting decisions of the various circuit courts. *It further facilitates the bringing of suits in the place of business of the parties interested.*"

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[13] "[I]n suits brought for the infringement of letters patent the Circuit Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

§ 48 of the 1911 Judicial Code provided:

> "'In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.'"

This provision later became § 109, 28 U.S.C. (1926).

[14] H. R. No. 2905, 54th Cong. 2d Sess.

Mr. Lacey, who had introduced the bill, then made several remarks to the effect that the *"main purpose" of the bill was to make possible patent suits where defendants had located infringing businesses.*[15]

Mr. Mitchell, who reported the bill, then made the remarks quoted as "significant" in *Stonite* (footnote 5, p. 565), as to the purpose to resolve uncertainty in the lower courts as to whether the 1887 Act governed patent venue.[16] It should be noted that only this part of the legis-

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[15] "Mr. Speaker, I introduced this bill at the suggestion of a number of gentlemen who live in the Northwest, and who have interest in patent rights that are frequently infringed in distant localities, and yet the sales of the patented articles so infringed are largely, or mainly, made in the vicinity where the owners of the patent happen to be located. For instance, the manufactory may be established at some distant point and the office where the goods are sold is opened in Chicago or in St. Louis or some other distant city. They have a permanent place of business at either city, and yet no relief can be had in the courts where the infringement is mainly carried on.

"The main purpose of the bill is to give original jurisdiction to the court where a permanent agency transacting the business is located, and that business is engaged in the infringement of the patent rights of some one who has such rights anywhere in the United States.

* * *

"It provides that the court shall have jurisdiction in the district of which the defendant is an inhabitant, *and that is the existing law now*, or [quoting the new second alternative proposed]." 29 Cong. Rec. 1900 (1897).

[16] "Mr. Speaker, the necessity for this law grows out of the acts of 1887 and 1888 which amended the judiciary act. Conflicting decisions have even arisen in the different districts in the same States as to the construction of these acts of 1887 and 1888, and there is great uncertainty throughout the country as to whether or not the act of 1887 as amended by the act of 1888 applied to patent cases at all.

"The bill is intended to remove this uncertainty and to define the exact jurisdiction of the circuit courts in these matters.

"The committee have been extremely careful in the investigation of the matter before reporting the bill.

"As the bill was referred to me, I wrote to a great many patent lawyers in different parts of the country, in order to get

lative history was brought to this Court's attention in the parties' briefs in *Stonite*.

The only objection came from Mr. Payne, who expressed the view that patent venue should not be given special treatment, but should be encompassed by the general venue rules. 29 Cong. Rec. 1901 (1897). Mr. Mitchell answered him by *inter alia* in effect summarizing his previous remarks[17], and then Mr. Lacey rephrased his earlier remarks. [18] The bill then passed.

Even less discussion took place in the Senate. The bill was there passed following this explanation by Senator Platt, who reported the bill for the Committee on Patents (29 Cong. Rec. 2396 (1897)):

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their views and objections, if any, and I find that they are all unanimously in favor of the bill as it is now reported, and state that it would tend not only to define the jurisdiction of the circuit courts not now defined, but also limit that jurisdiction and so clearly define it that in the future there will be no question with regard to the application of the acts of 1887 and 1888.

" . . . The trouble has arisen in this matter that under the act of 1888 some of the courts were uncertain whether or not the law did or did not apply to patent cases, and therefore this special bill relating to patents solely has been brought up because of the indefiniteness and uncertainty arising from different constructions of the act of 1888 as applied to patent cases." 29 Cong. Rec. 1900 (1897).

17 "[T]his special bill relating to patents solely has been brought up because of the indefiniteness and uncertainty arising from different constructions of the act of 1888 as applied to patent cases." 29 Cong. Rec. 1901 (1897).

18 "Business is going West, and a little plant on the seaboard often grows into a tremendous institution when it goes to Chicago and the great interior places where the population resides; and to deprive the courts of that community of jurisdiction would work hardship by reason of the expense that it would cause of having to take depositions or transport witnesses a thousand miles in the trial of a case. Why not have the trial where the transaction occurs? The jurisdiction under this bill only applies to the permanent place of business, or where the business is in existence." 29 Cong. Rec. 1902 (1897).

"Mr. President, corporations in these days that are using patented inventions go into various States and obtain charters or acts of incorporation and then do business in other States. *Now, to sue for an infringement of patent it is necessary that suit be brought in the State where the act of incorporation is obtained.* In some of the States there is no provision for service upon anyone, and the *corporations thus have an opportunity to infringe upon patents and almost escape any responsibility* for it by reason of the difficulty of finding them in order to sue them, for it is very inconvenient to travel across the continent to sue them when they are infringing in a business established near the plaintiff or the owner of the patent." 29 Cong. Rec. 2719 (1897).

Thus in the House of Representatives, two purposes were set forth in detail: (1) to provide for venue *broader than in cases generally*, in order to permit suit at places where infringing businesses were maintained; and (2) to resolve the uncertainties existing as to the applicability of the 1887 Act (as amended) to patent suits. *In the Senate only the former purpose was mentioned.*

This legislative history reflects concern not over abuses peculiar to patent suits resulting from broad venue, but over abuses permitted by a too narrow venue.

It may even be questioned whether the 1897 Act was in fact "restrictive", as this Court remarked in *Stonite* (315 U.S. 561, 566), for that assumes that the majority of the lower courts were correct, after *Keasbey*, in their judgment on a question never definitively answered by this Court. If the minority view was the correct one (which was to say the least, arguable), the 1897 Act was technically, as well as in Congressional contemplation, a liberalizing one.

But more important, *even if the 1897 Act was restrictive, it was so only in a technical sense,* and with respect to a general venue statute repudiated as over-broad ten years earlier. This act *did not restrict venue in patent suits with respect to a currently applicable general venue statute.* Congress acted in accordance with its strongly expressed purpose of making patent venue broader, in relation to the general venue statute then in force.

This was a policy clearly continued through the 1911 Code [19] and until at least 1948. It is a strange argument that a revision in that year, with plain language to the contrary, made patent venue narrower than general venue for the first time in our history.

So far as we know, the above history and considerations have not been presented to any court which has held that §1400(b) is not to be read with §1391(c). At the very least it must now be recognized, as Judge Aldrich said (*Denis* v. *Perfect Parts, Inc.*, 142 F. Supp. 259, 262 (D. Mass. 1956)):

> "Finally, defendant argues that §109 established a special policy for patent suits, and that this policy should be continued. The difficulty with this argument is that §109 established a policy of wider venue for patent suits than for other causes of action. If the exact interpretation of §109 is to be preserved in the face of the broadening of all other venue provisions with respect to corporations, it would mean that now, instead of being uniquely broad, venue in patent suits is uniquely narrow. Which 'policy' is to be continued—the previous exact meaning of §109, or that of liberal venue provisions for patent suits?"

Thus the legislative history of the 1897 Act supports

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[19] Footnote 13, p. 13, *supra.*

a construction of the patent venue section which is liberal, not restrictive, with respect to general venue provisions. No reason of substance, therefore, remains why the plain language of the 1948 statute should not be given effect; indeed its history, on analysis, gives positive support to the judgment of the court below.

Consideration in Connection with Other Portions of the Judicial Code Supports the Clear Statutory Language

The judgment below is given much support when sections 1400(b) and 1391(c) are read in context and together with other provisions of the Judicial Code of which they are part.

First of all, as Judge Clark said below (R. 10):

> *"It does seem odd drafting, to say the least, to add after a general and unlimited defining statute a series of eight or ten exceptions*—all unexpressed as such, but each destroying the generality of the first provision. For precisely the same problem can be raised—even though this does not seem to have been generally perceived—as to the series of special venue statutes in this chapter, as well as those elsewhere stated, such as seamen's suits under the Jones Act. It hardly seems possible—and the cases do not support the view—that Congress intended any such inroad on its general principle as to take out all these situations; nor is there any ground for distinguishing between, e.g., claims for patent infringement, for unfair competition, or for violation of the antitrust laws, which might properly come up in a single suit and be conveniently disposed of together."[20]

[20] See also *Farr Co.* v. *Gratiot*, 92 F. Supp. 320, 322 (S.D. Cal. 1950). As the Court below pointed out (R. 10, footnote 6), where

The truth of Judge Clark's final observation is underlined by new §1338(b) of the Judicial Code:

> "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws."

Furthermore, other sections, in form independent of §1400(b), affect patent venue. As Judge Hall said in *Farr Co.* v. *Gratiot*, 92 F. Supp. 320, 322 (S.D. Cal. 1950):

> "The 1948 Judicial Code has many changes in it and many additions to it, which must be read together with any individual section; for instance the addition of Sections 1404(a) and 1406 just mentioned. *To accept the [petitioner's] contention would be to say that these two sections apply to neither 1400(a) nor 1400(b).*"

We do not understand petitioner to challenge the applicability of § 1404(a)[21] to patent infringement suits; this section is applicable to venue even in cases governed by special sections outside Title 28.[22] As the court below found, *Collett* is "so analogous as to be authoritative here." (R. 8).[23]

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exceptions to the generality of a section were intended, as in subsections (a) and (b) of section 1391, they were expressly included. Both these subsections include the language "except as otherwise provided by law."

[21] "§ 1404. *Change of venue*

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[22] *Ex parte Collett*, 337 U.S. 55 (1949; Federal Employers' Liability Act [7-2]); *United States* v. *Nat. City Lines*, 337 U.S. 78 (1949; Government-brought antitrust suit [7-2]).

[23] The argument that a distinction can be drawn (Pet. Br. 27-28)

The inclusion of the transfer provision of § 1404(a) is extremely important from another standpoint:—it facilitates preventing any possible abuses. As Judge Hall said in *Farr*, 92 F. Supp. 320, 322, relying heavily on the new transfer provisions (despite a mistaken impression of the history of the special patent venue provision, pp. 11-18, *supra*):

> "But such reliance [on *Stonite*] overlooks the fact that the abuses in the choice of venue mentioned in the *Stonite* case may be cured by the use of the provisions for the transfer of cases permitted by Sections 1404(a) and 1406 of the 1948 Judicial Code, which are entirely new, and not just a revision or rephrasing of existing law."

Furthermore, the significance of § 1404(a) has been increased by this Court's recent decision that transfer is available on a lesser showing than would have been required for dismissal under prior law. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955).

Still another indication of Congressional purpose that venue in litigation involving validity and infringement of patents be no more limited than venue generally is found in Chapter 151, ("Declaratory Judgments") of the 1948 Judicial Code. In suits under this Chapter, § 1391 governs

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in that those cases involved the question of change of a proper venue while the present question relates to the earlier matter of when venue is proper, seems more verbal than substantial. As Mr. Justice Rutledge so clearly pointed out in his concurring opinion in *Collett* (p. 73), "[T]he changes made in [this court's earlier relevant decisions] by § 1404(a) were in the nature of repeals, to the extent that the plaintiffs were deprived of their rights under the pre-existing statutes to have their causes of action tried in the forums where they were properly brought."

venue.[24] No reason appears why a different rule should be applicable to a straightforward patent infringement suit than to such declaratory judgment suits, which are of course infringement suits in reverse.

Also significant[25] is omission from the 1948 Judicial Code of any provision comparable to § 294 of the Judicial Code of 1911:[26]

> "The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."[27]

The 1948 Judicial Code should be given straightforward reading as an organic whole. As Judge Aldrich said in *Denis* v. *Perfect Parts*, 142 F. Supp. 259, 262 (D. Mass. 1956):

> "Whatever may be the history of its precursors, as presently set up § 1400(b) appears no more a special act than does any other section of the chapter. Nor is § 1391(c) a general act. It is not even a whole act. In terms it is but definitions for the remaining sections of the chapter."

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[24] *Barber-Greene Co.* v. *Blaw-Knox Co.*, 112 USPQ 73 (6th Cir. January 11, 1957), see *Clayton* v. *Swift & Company*, 132 F. Supp. 154, 156 (E.D. Va. 1955) mandamus denied *sub nom.* *Clayton* v. *Warlick*, 232 F.2d 699 (4th Cir. 1956) and cases cited.

[25] Moore's "Commentary on the U. S. Judicial Code" (1949), p. 76.

[26] Act, Mar. 3, 1911, c. 231; 36 Stat. 1167.

[27] Though omitted from the 1926 Code except as a note to § 432 thereof this section was not repealed until 1948 (Pamphlet, "Judiciary and Judicial Procedure," U.S. Code Cong. Serv. 1487-2174, 80th Cong. 2nd Sess., p. 1656); and of course it had a bearing on the construction

Although Recourse to Legislative History Is Unwarranted That History Nevertheless Supports the Plain Meaning of the Statutory Language

The language of §§ 1400(b) and 1391(c) is so plain, we submit, that recourse to legislative history, including reviser's notes, is not justified. Nonetheless, critical consideration of these materials, on balance, provides yet additional support that the Congress meant what it said.

The Statutory Language Is Too Clear to Warrant Recourse to Legislative History.

Mr. Chief Justice Vinson's remarks, for the majority, in *Collett* (337 U.S. 55, 61) seem fully applicable here:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945). 'This canon of construction has received consistent adherence in our decisions.'" [28]

For an opinion applying these principles forcefully to the

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of separate sections of the code in which it too was included. *The pamphlet just cited is hereinafter referred to as "Code Cong. Serv. Pamph."*

[28] See also the opinion of Mr. Justice Jackson, with whom Mr. Justice Minton joined, concurring in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 395 (1951):

> "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared."

question at bar see Judge Huxman's dissenting opinion in *Ruth* v. *Eagle-Pitcher Company*, 225 F.2d 572, 578 (10 Cir. 1955).

NOR IS RECOURSE TO THE REVISER'S NOTES WARRANTED IN VIEW OF THE CLEAR STATUTORY LANGUAGE AND THE RELATIVE AMBIGUITY OF THE REVISER'S NOTES.

Although the "reviser's notes are so obviously authoritative in perceiving the meaning of the Code" (*United States* v. *Nat. City Lines*, 337 U.S. 78, 81 (1949)), not even they should be allowed to override plain language in the statute. Professor Moore said, after quoting the above language from the *Nat. City Lines* case:

> "The Notes, then, are to be taken as aids to construction, and to the extent that a Note fails to recount the complete changes made by a section, or is partially inaccurate, it cannot prevail over an unequivocal statutory provision."[29]

The above principle is *a fortiori* applicable where, as here, the reviser's notes are *more ambiguous* than the statute. Judge Aldrich well stated, in *Denis* v. *Perfect Parts*, 142 F. Supp. 259, 262 (D. Mass. 1956).[30]

> "As pointed out by Lindley, C. J., dissenting in the C-O-Two case [194 F.2d 410, 415 (7 Cir.)], the Eagle-Picher [225 F.2d 572 (10 Cir. 1955) (2-1)] rule re-

[29] Moore's "Commentary on the U. S. Judicial Code" (1949), p. 78. Accord: *Farr Co.* v. *Gratiot*, 92 F. Supp. 320, 322 (S.D. Cal. 1950; Hall, D.J.): "I cannot agree that the revisors' notes as to any particular section should control over the text of the Code, where there is no ambiguity in the text."

[30] This carefully reasoned opinion was, contrary to the inadvertent implication at page 7 of petitioner's brief on Petition for Writ of Certiorari, handed down almost two weeks prior to the decision of the court below.

writes § 1391(c) to say in effect, 'for the purpose of every section of this chapter *except* § 1400(b), "resides" in the case of corporations means doing business.'

"For such interpolation of an unexpressed limitation there should be some clearly compelling warrant. The majority opinion in Eagle-Picher states that if warrant is not found on the basis of special versus general acts, it is found in the Reviser's Notes. Assuming, without deciding, that the statute is sufficiently ambiguous to permit such recourse, still it is not appropriate unless the Reviser's Notes are clear and unambiguous, or at least more clear and less ambiguous than the statute itself. With all deference, I do not find this to be the situation. It is true that the Reviser's Notes to § 1400(b) point out that this section is taken from § 109 of Title 28 U.S.C., 1940 ed., where instead of resident the word used was inhabitant, and state that as respects venue the two words are synonymous. It is true, also, that inhabitant as respects corporations was limited in § 109 to the state of incorporation. But so, too, it was then so limited with respect to all other actions. See *Suttle* v. *Reich Bros. Construction Co.*, 333 U.S. 163, 166, 68 S.Ct. 587, 92 L.Ed. 614, rehearing denied 333 U.S. 878, 68 S.Ct. 900, 92 L.Ed. 1153. Section 1391(c) has now expressly changed that. It is to be observed that the Reviser's Notes to § 1400 specifically refer to the note to § 1391. It scarcely seems that the Reviser was then forgetful of the fact that § 1391(c) broadened generally the meaning of resident in the case of corporations. In sum, I do not find in the Notes any clear or compelling ground to read into § 1400(b) an exception to the supplied definitions." (emphasis the court's)

LEGISLATIVE HISTORY OF 1948 JUDICIAL CODE SUPPORTS THE JUDGMENT BELOW.

Though resort to legislative history is not warranted, when studied as a whole, that history, on balance, supports further the language of the statute. The history manifests throughout three major legislative purposes:—to modernize the law; to resolve conflicts in the law; and to put the law into clear and easily understandable form. All three purposes are given effect by the judgment of the court below; but at least the first and third would be defeated by a decision to the contrary.

While there is some support in the legislative history for the argument that no "change" was intended unless pointed out in the reviser's notes, there is also material pointing the other way. And although there are expressions in the legislative history that no "substantive controversial change" was intended, it seems clear, in perspective, that, in fact, this case is concerned with no "substantive controversial change" in the sense in which those words were used.

The Statutory Language Gives Effect to Legislative Intent to Modernize and Improve the Law.

The legislative history shows throughout that one major purpose was to modernize and improve the Judicial Code, including specifically the venue provisions.

The revisers were at great pains to collect all pertinent statutory, decisional, and law review material available.[31]

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[31] "Before actual revision was begun a scientific plan was assembled. This included:

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"4. Applicable constructions by the courts.

"5. Notes based upon a careful examination of the Code of Federal Regulations and law reviews.

"6. Exhaustive historical notes.

* * *

"8. Suggestions from the bench and bar."

They asked for and received suggestions from the bench, and from practicing and teaching members of the profession.

> "When work first began on title 28, letters were mailed to all Federal judges, United States attorneys, deans of law schools, and presidents of bar associations, explaining the revision and asking for suggestions and criticisms. Many letters received by the committee in response contained recommendations for the improvement of the judicial code. These were catalogued, studied and made available to the revision staff. *They were invaluable in making possible a thorough revision.*" [32]

See also the remarks of Judge Albert B. Maris,[33] who explained his committee's work of seeking, collating, and transmitting to the reviser's staff suggestions of the lower federal judiciary, and said:[34]

> "The result is that the revision which is now incor-

H. R. Report No. 308, 80th Cong., 1st Sess., to accompany H. R. 3214; Code Cong. Serv. Pamph., pp. 1692-1693.

See also the remarks of Judge Miller, a member of the "advisory committee" created by the publishing companies undertaking the revision (Code Cong. Serv. Pamph., p. 1946):

"We had the books before us, and we had the decisions of the Supreme Court and the circuit courts of appeals and we had all the information before us that a judge would have working on a brief in his chambers." Code Cong. Serv. Pamph., p. 1952.

[32] H. R. Report No. 308, 80th Cong., 1st Sess., to accompany H. R. 3214; Code Cong. Serv. Pamph., p. 1695.

[33] Judge Maris was a member of the advisory committee appointed for the Judicial Conference by the Chief Justice of this Court (Code Cong. Serv. Pamph., p. 1947), and testified at a Hearing on H. R. 2055 (predecessor to H. R. 3214, the bill which was enacted as the 1948 Judicial Code), March 7, 1947.

[34] Code Cong. Serv. Pamph., pp. 1958, 1959.

porated in H.R. 2055 embodies a number of practical improvements in the judicial machinery of a wholly noncontroversial nature which have resulted from suggestions originating with the judges whose day to day administration of the various provisions of the judicial code gives them a special knowledge of these matters.

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"Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized. At the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval."

In addition to the above reflections of legislative purpose to improve and modernize were remarks made by several other participating experts.[35] John F. X. Finn, Esq. said (Code Cong. Serv. Pamph., p. 1985):

"This code is a progressive code, a wise code, a flexible code, and a cautious code.

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"*I am proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure.* These are but labels to the laymen. To lawyers they are the pitfalls of litigation. Wise judges and lawyers have objectively and dispassionately explored these pitfalls and covered them with well-drawn statutes so that postwar justice may be sure-footed, courageous, impartial, and serene.

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[35] See also the comments of Professor James William Moore (Code Cong. Serv. Pamph., p. 1967) and Judge Floyd E. Thompson (*Ibid.*, p. 1970).

> "The legislature must see to it that wise and progressive judges are provided with the tools of justice. And *the legislative foundation of judicial action must be broad-based and modernized.* These objectives this bill assists in achieving. *It adapts the statutory basis* of justice to resist when necessary and to yield when necessary to the stresses and strains of modern affairs." [36]

Thus one strong legislative purpose was to *improve and modernize,* including specifically venue provisions, on the basis of the latest suggestions and legal material. That the modern policy favoring broadened venue on a realistic basis against corporations generally was considered by the revisers is of course shown by their inclusion of § 1391(c).[37] But, as above shown (p. 9), the same policy was at least equally applicable in patent infringement suits.[38] And the question specifically in relation to patent cases was well to the fore when the Judicial Code was in preparation, both as a matter of evaluating the import of *Neirbo (infra,* pp. 29-30) and on general principles.[39]

The plain language of the statute must govern to give effect to the legislative purpose of improving and modernizing in conformity with available suggestions and legal materials.

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[36] Code Cong. Serv. Pamph., p. 1985. Mr. Finn was a staff member of the Committee on Revision of the laws, which was primarily charged with responsibility for the Judicial Code. *Ibid.*, p. 1946.

[37] See also Judge Clark's discussion, *supra* pp. 7-8, of the material favoring this modernization.

[38] As a matter of historical Congressional policy, policies favoring broadened venue were *a fortiori* applicable to such suits. *Supra,* pp. 11-18.

[39] See the language quoted from *Shelton, supra,* pp. 9-10.

The Statutory Language Gives Effect to Legislative Intent to Resolve Conflicts.

Another important legislative purpose was to resolve conflicts.

As stated in H.R. Report No. 308:[40]

> "Revision, as distinguished from codification, required the substitution of plain language for awkward terms, *reconciliation of conflicting laws*, repeal of superseded sections, and consolidation of related provisions."[41]

And further, under the heading "Examples of Changes in Law":

> "So also, minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under Sections 1391-1406."[42]

Contrary to petitioner's impression of what courts had "consistently and universally" held (Pet. Br. 8) prior to 1948, there then existed with respect to patent venue much the same sort of conflict as to the import of *Neirbo* as existed with respect to venue generally.[43]

That *Neirbo* extended patent venue was squarely held

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[40] *Supra*, p. 25, note 31.

[41] Code Cong. Serv. Pamph., p. 1693.

[42] *Ibid*, p. 1697. See also, in addition to Judge Maris' remarks (*supra*, p. 27), the remarks at the same hearing of Mr. William W. Barron, Chief Reviser, to the effect that the purpose was to present a "*restatement . . . which would clarify ambiguities, eliminate overlapping and conflicting provisions of law and simplify existing law*, so as to promote the administration of justice in the Federal courts." *Ibid.*, p. 1964.

[43] See note 6, *supra*, p. 7.

in two final decisions. *California Stucco Products* v. *National Gypsum Co.*, 33 F. Supp. 61 (D. Mass. 1940); *James P. Marsh Corp.* v. *United States Gauge Co.*, 129 F.2d 161, 162 (7 Cir. 1942). *Accord: Farval Corp.* v. *Blaw-Knox Co.*, 60 F. Supp. 900 (N.D. Ohio 1945). However, *Farval* was reversed in *Blaw-Knox Co.* v. *Lederle*, 151 F.2d 973 (6 Cir. 1945), *Neirbo* being distinguished on the ground it was a diversity case.[44] *Accord: Consolidated Water Power & Paper Co.* v. *Kimberly-Clark Corp.*, 73 F. Supp. 936 (E. D. Wisc. 1947). We have found no other decisions squarely in point.[45]

It seems strongly arguable that the better view found *Neirbo*, which turned on waiver, applicable to patent infringement cases.[46] But however that may be, there certainly was a conflict.

It is just such conflicts that the legislative history shows a strong purpose to resolve.

The language of the statute should thus be given effect to resolve the conflict as to whether *Neirbo* was applicable to patent infringement suits.

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[44] See also *American Chemical Paint Co.* v. *Dow Chemical Co.*, 161 F.2d 956, 959 (6 Cir. 1947).

[45] There were *dicta* in accord with the sixth circuit *Blaw-Knox* decision in *Bulldog Electric Prod. Co.* v. *Cole Electric Prod. Co.*, 134 F.2d 545 (2 Cir. 1943), *cert. denied*, 322 U.S. 714 (1944), and *American Chemical Paint Co.* v. *Dow Chemical Co.*, 161 F.2d 956, 959 (6 Cir. 1947). The question is discussed in *Carbide & Carbon C. Corp.* v. *United States I. Chemicals*, 140 F.2d 47, 50 (4 Cir. 1944) *reversed*, 315 U.S. 668.

This subject was discussed (with somewhat inaccurate handling of the cases) in Note, "The Aftermath of the Neirbo Case" 42 Ill. L. Rev. 780, 786-8 (1948).

[46] In *General Elec. Co.* v. *Marvel Co.*, 287 U.S. 430 (1932) it was held that venue may be waived in such a suit, and cases finding *Neirbo* inapplicable except to diversity suits would appear to have been unsound.

The Statutory Language Should Govern to Give Effect to the Congressional Purpose That the Meaning of the Code Be Clear to the Reader.

Another strong legislative purpose was to produce a code which was clear.[47]

Mr. Keogh said:

> "I am concerned not only with the bench and bar, Mr. Chairman, but I think the public is entitled primarily to know what the laws of its country are, and I think that the public is entitled to have those laws presented to it in the clearest, most concise and most understandable form and it is my opinion that that can be accomplished by the work which your subcommittee is now undertaking."[48]

Mr. Robsion said on the floor of the House:

> "It will serve not only as the body of the laws that are now in existence, but also as a framework for future laws. The law on any particular subject can then be quickly and easily found by the average intelligent citizen and in the event that amendments or changes are desirable, it will be most helpful in that respect."[49]

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[47] See language quoted *supra*, p. 27.

[48] Hearing before Subcommittee No. 1 of House Judiciary Committee, March 7, 1947. Code Cong. Serv. Pamph., 1949-1950. Mr. Keogh introduced the original bill. *Ibid.*, p. 1941. Mr. Finn (footnote 36, p. 28, *supra*), said of the revision conferences at the same Hearing (*Ibid.*, p. 1983):

> "These conferences exuded idealism and enthusiasm and yet practical restraint. *The omnipresent text was Mr. Keogh's observation that 'making the laws understandable is as important as making the laws.'*"

[49] July 7, 1949. Code Cong. Serv. Pamph., p. 1994. Mr. Robsion reported H. R. 3214 for the Committee of the Judiciary. *Ibid.*, p. 1692.

Certainly the judgment below must be affirmed if this legislative purpose is to be given effect.

Not All Substantive Changes Were Clearly Specified as Such in the Reviser's Notes.

Petitioner argues that the legislative history indicates a purpose to effect no changes not "clearly expressed and fully explained in the reviser's notes" (Pet. Br., footnote 6, pp. 12, 13).

One very compelling answer to this argument was given by Judge Huxman, dissenting in *Ruth* v. *Eagle-Picher Company*, 225 F.2d 572, 578-579 (10 Cir. 1955):

> "But not all important changes were noted in the revisor's notes. Clearly an important change was made in Section 1391(c), yet the revisor's notes do not call attention to this change."[50]

The change in patent venue found by the court below is, at most, a special case within the policy and change clearly enacted in § 1391(c), a section of enormously wider applicability than § 1400(b).

Furthermore, there seems some indication that the reviser's expressed *intention was rather to point out all changes in "text"*[51] *than to point out the full legal implications of every change.* Of course the reviser's notes to § 1391(c) and § 1400(b) do clearly point out that the

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[50] As a matter of fact, the reviser's notes to § 1404(a) hardly pointed out *clearly* the change held in *Collett* to have been effected, despite the citation of one case which, though not said to be, had in fact been decided under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149; 35 Stat. 65; as amended; 45 U.S.C. §§ 51-59). Not even this sort of clue was given with respect to government anti-trust suits, as to which it was held in a companion case that § 1404 (a) was also applicable. *United States* v. *Nat. City Lines*, 337 U.S. 78 (1949).

[51] See especially the quotations at p. 14 in footnote 6, Pet. Br. 12.

language was changed, and go so far even as to include in the latter a cross-reference to the former.

The Change in Corporate Patent Venue Was Not a "Controversial Substantive" Change.

It is argued further that no changes in law were intended except those that would meet with "substantially unanimous approval" or were "non-controversial".[52]

The change clearly worked in § 1391(c) leaves little of this argument.[53] In perspective, a broadened patent venue

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[52] Pet. Br. 12, 13, 14 (footnote 6). Interesting statements of the approach intended, not quoted by petitioner, were made by Mr. Keogh and Senator Donnell. Mr. Keogh said (Code Cong. Serv. Pamph., p. 1945):

> "The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing companies as well as the employees of the committee, was *to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.*"

Mr. Donnell said, answering a question of Mr. Robertson on the floor of the Senate (Code Cong. Serv. Pamph., p. 2020):

> "The bill presents this codification as a thoroughly expert codification of existing law; does it not?
>
> "Mr. Donnell. Mr. President, that is not quite an accurate statement to this extent: In codifying and revising, it was felt essential in some instances—as, for instance, in the matter of habeas corpus—to redraft the provisions of the statute. We have the advantage of knowing what the judicial conference of senior circuit judges, of whom the Honorable John J. Parker, I think, is the head, had decided as to what should be done with respect to that particular subject. That is but one illustration of various changes that have been made.
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> "*It would take considerable time to state all the changes;* but I may say that the purpose of this bill is primarily to revise and codify and to enact into positive law, *with such corrections as were deemed by the committee to be of substantial and noncontroversial nature.*" Code Cong. Serv. Pamph., p. 2020.

[53] *Denis* v. *Perfect Parts*, 142 F. Supp. 259, 262 (footnote 5) (D. Mass. 1956):

> "This admitted and obvious change would seem to rebut the presumption of no change through codification referred to in

can hardly be said to be more controversial than a correspondingly broadened general venue section of vastly wider applicability.

Another and more fundamental answer to petitioner's argument is that, from the standpoint of the revisers, resolving the *Neirbo* conflicts on the scope of general and patent venue, and at the same time liberalizing both slightly by putting corporate venue on a more realistic and generally favored modern basis, would hardly have been thought controversial. It would have been much more reasonable to expect substantial unanimity with respect to these changes, which were of the very sort the revisers repeatedly stated they intended (*supra*, pp. 25-32).

Some light on the sort of thing the revisers thought of as "controversial" is shed by noting both the sorts of change that were avoided as such (in the peonage laws and in crimes against international law;[54] elimination of diversity jurisdiction[55]) and the types of change that were made (§§ 1404(a), 1406, and 1391(c); and even the provision making the Tax Court a judicial body, which proved

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Eagle-Picher. In the face of that change I find certain statements by Messrs. Barron and Moore quoted in the majority opinion to the effect that the revision makes no alterations in existing law hard to understand."

[54] Judge Miller said (Code. Cong. Serv. Pamph., p. 1953):

> "*In a few areas we felt that more work was necessary before it could be said that complete revision has been accomplished;* but that the time is not yet ripe for doing it. For example, consider the subject of *slavery and peonage.* The laws upon this subject were in disuse for many years."

He then referred to another example: "the area of crimes against international law".

[55] Professor Moore, after specifying "Improvement" as one purpose of the revision, said:

> "The latter might have involved far-reaching change. For example, diversity jurisdiction might have been eliminated, as many have advocated. But the revision has made no basic changes." Code Cong. Serv. Pamph., p. 1967.

to be controversial[56] and was deleted in Senate committee[57]).

The following comment in Professor Moore's treatise[58] seems especially appropriate:

> "Nor can plain statutory language be overcome by the argument that it involves a 'controversial' matter and that the Code made no changes of a controversial character. [Citing *Nat. City Lines.*] *To special interests and special pleaders the Code has probably made many 'controversial' changes.*"

THE REVISER'S NOTES SUPPORT THE JUDGMENT BELOW

Although reference to the reviser's notes is unwarranted, in view of the clearness of the statute and the relative ambiguity of the notes, they nevertheless suggest that §§ 1391(c) and 1400(b) should be read together. For after mentioning the change in language from "inhabitant" to "where the defendant resides," the reviser's note to § 1400 says:

> "Words, 'inhabitant' and 'resident,' as respects venue, are synonymous. *(See reviser's note under section 1391 of this title.)*"

Petitioner's arguments finding support in these notes (Pet. Br. 13-20) seem fully answered by Judge Aldrich's analysis (quoted *supra*, p. 24).

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[56] Code Cong. Serv. Pamph., p. 2009.

[57] Code Cong. Serv. Pamph., p. 2037.

[58] *Op. cit.*, note 29, p. 23, at p. 79.

The Judgment Below Finds Substantial Support In Decisions of the Lower Federal Courts and Other Authorities

The view that the plain language of the statute controls finds substantial support in the legal writings, and in the decisions of the lower federal courts, both on the question at bar and on closely analogous questions.

Authorities on the Question at Bar

In accord with the court below are square holdings, supported by carefully reasoned opinions, of one other unanimous Court of Appeals[59] and two District Courts,[60] as well as the legal writers generally, including Professor Moore.[61]

The two Court of Appeals opinions supporting judgments to the contrary effect[62] were marked by vigorous dissents, and relied heavily on a mistaken view of Congressional patent venue policy, as thought to be reflected in *Stonite*. The latter may also be said of the District

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[59] *Dalton* v. *Shakespeare Co.*, 196 F.2d 469 (5 Cir. 1952); *Guiberson Corp.* v. *Garrett Oil Tools*, 205 F.2d 660 (5 Cir. 1953), *cert denied*, 346 U.S. 886, *rehearing denied*, 346 U.S. 917 (1955).

[60] *Denis* v. *Perfect Parts*, 142 F. Supp. 259 (D. Mass. 1956); *Farr Co.* v. *Gratiot*, 92 F. Supp. 320 (S.D. Cal. 1950).

[61] James William Moore, "Commentary on the U. S. Judicial Code" (1949), pp. 178-179, 183-185, 192-194; 3 Moore's Federal Practice 2139, 2140 (2 Ed. 1948); Note, "Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts", 56 Col. L. Rev. 394, 413-416 (1956); Note, "Venue in Patent Infringement Suits in the Federal Courts", 47 Nw. L. Rev. 699-705 (1952); Note, "A New Look at Venue in Patent Infringement Suits", 21 Geo. W. L. Rev. 610 (1953).

[62] *Ruth* v. *Eagle-Picher Company*, 225 F.2d 572 (10 Cir. 1955) (2-1); *C-O-Two Fire Equipment Co.* v. *Barnes*, 194 F.2d 410 (7 Cir. 1952) (2-1), *aff'd by an equally divided Court sub nom. Cardox Corporation* v. *C-O-Two Fire Equipment Co.*, 344 U.S. 861, *rehearing denied* 344 U.S. 900 (1952).

Court opinions in accord,[63] of the dicta to the same effect,[64] and of the decisions[65] refusing to read § 1392(a)[66] together with § 1400(b).

Several other cases often cited on the question at bar did not express, even in dictum, a viewpoint on that or any substantially analogous matter.[67]

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[63] *Kamkap, Inc.* v. *Worldsbest Industries*, 140 F. Supp. 854 (S.D. N.Y. 1956); *Otto* v. *Koppers Company*, 134 F. Supp. 886 (N.D. W.Va. 1955); *Jones* v. *Radio Corporation of America*, 129 F. Supp. 440 (S.D. N.Y. 1955); *Pierce* v. *Perlite Aggregates*, 110 F. Supp. 684 (N.D. Cal. 1952); *Gulf Research & Dev. Co.* v. *Schlumberger Well Sur. Corp.*, 92 F. Supp. 16 (S.D. Cal. 1950); *Rava* v. *Westinghouse Electric Corporation*, 90 F. Supp. 707 (S.D. N.Y. 1950).

[64] Most dicta were of opinion that §§ 1400(b) and 1391(c) were not to be read together. *Sunbeam Corporation* v. *Picard*, 227 F.2d 596 (6 Cir. 1955); *Fairhope Fabrics, Inc.* v. *Mohawk Carpet Mills, Inc.*, 140 F. Supp. 313 (D. Mass. 1956); *Clayton* v. *Swift & Company*, 132 F. Supp. 154 (E.D. Va. 1955); *Transmirra Products Corp.* v. *Magnavox Co.*, 110 F. Supp. 676 (S.D. N.Y. 1953); *Ronson Art Metal Works* v. *Brown & Bigelow, Inc.*, 104 F. Supp. 716 (S.D. N.Y. 1952); *Federal Electric Products Co.* v. *Frank Adam Electric Co.*, 100 F. Supp. 8 (S.D. N.Y. 1951); *Nachtman* v. *Jones & Laughlin Steel Corporation*, 90 F. Supp. 739 (D.D.C. 1950). *Contra*: *Pharma-Craft Corporation* v. *F. W. Woolworth Co.*, 144 F. Supp. 298 (M.D. Ga. 1956), *mandamus denied*, 236 F.2d 911 (4 Cir. 1956).

[65] *Ackerman* v. *Hook*, 183 F.2d 11 (3 Cir. 1950); *Arkay Infants Wear* v. *Kline's, Inc.*, 85 F. Supp. 98 (W.D. Mo. 1949); *Fischer* v. *Karl*, 84 F. Supp. 53 (E.D. N.Y. 1949); and, apparently, *Curtis* v. *Madovoy*, 84 F. Supp. 637 (E.D. N.Y. 1949). These cases, of course, deal under the 1948 Code with much the same problem which *Stonite* faced under the predecessor code.

[66] "*Defendants or property in different districts in same State*

"(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

[67] *Gulf Research & Development Co.* v. *Leahy*, 193 F.2d 302 (3 Cir. 1951), aff'd *by an equally divided Court*, 344 U.S. 861, *rehearing denied*, 344 U.S. 900 (1952); *S. O. S. Co.* v. *Bolta Co.*, 117 F. Supp. 59 (N.D. Ill. 1953); *Dolly Toy Co.* v. *Bancroft-Rellim Corp.*, 97 F. Supp. 531 (S.D. N.Y. 1951); *Latini* v. *R. M. Dubin Corporation*, 90 F. Supp. 212 (N.D. Ill. 1950); *Lisle Mills* v. *Arkay Infants Wear, Inc.*, 84 F. Supp. 697 (E.D. N.Y. 1949).

Decisions Under the Jones and Clayton Acts Strongly Support by Analogy the Judgment Below.

Decisions under the Jones and Clayton Acts, both characterized by special venue provisions not even encompassed within the 1948 Judicial Code, strongly support by analogy the judgment below.

Judge Weinfeld's decision in *Phillips* v. *Pope & Talbot, Inc.*, 102 F. Supp. 51, 52 (S.D.N.Y. 1952), quoting the strikingly similar Jones Act [68] venue provision, seems of sufficient bearing to quote:

> "The venue provision of the Jones Act is as follows: '* * * jurisdiction * * * shall be under the court of the district *in which the defendant employer resides or in which his principal office is located.*' * * *
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> * * *
>
> "The Jones Act is such a special statute to which the general venue provisions of Section 1391 are applicable. So construed Section 1391(c) extends the term 'residence' in the Jones Act so that a corporation may be sued in the judicial district wherein it is doing business or licensed to do business. See also *Bagner* v. *Blidberg Rothchild Co., Inc.*, D.C., 84 F. Supp. 973; *Bounds* v. *Streckfus Steamers, Inc.*, D.C., 89 F. Supp. 242; *Mincy* v. *Detroit & Cleveland Navigation Co.*, D.C.S.D. N.Y., 94 F. Supp. 456.
>
> "Absent a clear expression of intent by the Congress to confine a litigant to the special venue provisions of the Jones Act, he should not be deprived of the extended provisions of the general venue statute. No such intention appears."

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[68] Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U.S.C. § 688.

The three decisions cited were all holdings to the same effect, and no decision to the contrary has been found.

Two decisions under the Clayton Act [69] have found venue proper where defendant was licensed to do business, relying on § 1391(c). *Bertha Bldg. Corp.* v. *National Theatres Corp.*, 106 F. Supp. 489 (E.D.N.Y. 1952); *Lipp* v. *National Screen Service Corp.*, 95 F. Supp. 66 (E.D. Pa. 1950). Judge Kennedy said in the *Bertha* case, in language equally relevant to the question at bar (p. 490):

> "For even if the matter were *res integra* I would reach the conclusion that when Congress affords a plaintiff-litigant the opportunity to sue in a prescribed district because of the existence of a specific federal question (arising under the anti-trust laws), and also in another statute gives wider latitude where *any* federal question exists, it would be a narrow technicality to close the doors of the courts of the latter district unless Congress had given some indication that this was its intention, which here it did not."

Because he too shared the widespread misimpression that "apparently in cases under the patent laws Congress has evinced an intention to restrict venue . . .", he felt the question "not free from difficulty" (p. 490), but went on (pp. 490, 492):

> "But I find no reason why a suitor under the anti-trust laws should by implication be unduly fettered by venue provisions, particularly since cases of harassment can be dealt with under the forum non conveniens theory.

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[69] Act of October 15, 1914, Chap. 323, 38 Stat. 730, as amended; 15 U.S.C. §§ 12-27.

> *"Congress must surely also have known that a flood of litigation had turned on the question of what constitutes doing business and on the Neirbo waiver doctrine: and the whole trend, I think, was towards the elimination or reduction of venue-jurisdiction complications when the code was revised in 1948.* The only conclusion I can reach is that when Congress made a foreign corporation suable 'in any judicial district in which it is * * * licensed to do business' Congress meant what it said, and therefore that the venue here is properly laid under the section in question."

And in *Anderson-Friberg, Inc.* v. *Justin R. Clary & Son*, 98 F. Supp. 75, 83 (S.D. N.Y. 1951) it was held that § 1392 (a) of Title 28 is also applicable to Clayton Act suits. Judge Weinfeld's reasoning there is directly applicable here, in view of the consistent historical Congressional intent to provide for liberal patent venue:

> "The special venue provisions contained in the anti-trust laws were intended as an enlargement of venue and to broaden the choice of a forum available to plaintiffs in anti-trust actions. *United States* v. *Scophony Corporation of America*, 333 U.S. 795, 804. . . .
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> * * *
>
> "The general venue provisions now contained in New Title 28, Sections 1391 et seq., effective September 1, 1948, may be considered supplementary to, and not in limitation of, the venue provisions contained in the anti-trust laws and other special statutes. Thus, for example, the forum non conveniens provision, Section 1404(a) of Title 28, has been held applicable to anti-trust suits. . . ."

CONSTRUCTION OF THE OTHER SPECIAL STATUTES IN CHAPTER 87 SUPPORTS THE JUDGMENT BELOW.

The decisions under the other special venue sections following § 1391 lend strong support to the decision of the court below.

The only decision found under the interpleader special venue section [70] held that it must be read with § 1391(c). *Moseley* v. *Sunshine Biscuits*, 110 F. Supp. 157 (W.D. Mo. 1952).

The only decisions found have held that § 1391(c) must also be read with §§ 1393(a) and 1393(b),[71] which prescribe the proper division or district for suit against single and multiple defendants, respectively. *Reeder* v. *Corpus Christi Refining Co.*, 111 F. Supp. 756 (S.D. Tex. 1952) (under § 1393(a)); *Pan American Air.* v. *Consolidated Vultee Air. Corp.*, 87 F. Supp. 926 (S.D.N.Y. 1949) (under § 1393(b)).

Section 1391(c) was held applicable to corporate plaintiffs in suits against the United States within § 1402,[72] in *Southern Paperboard Corporation* v. *United States*, 127

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[70] "§ 1397. *Interpleader*

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

[71] "§ 1393. *Divisions; single defendant; defendants in different divisions*

"(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

"(b) Any such action, against defendants residing in different divisions of the same district or different districts in the same State, may be brought in any of such divisions."

[72] "§ 1402. *United States as defendant*

"(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides.

"(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

F. Supp. 649 (S.D.N.Y. 1955), in which Judge Dimock cited a number of cases in support of his decision, and expressly rejected the reasoning of *United Merchants & Manufacturers* v. *United States*, 123 F. Supp. 435 (M.D. Ga. 1954), a case to the opposite effect.[73]

We have already referred to the decisions refusing to read § 1392(a) with § 1400(b).[74]

Stonite Was Decided on Such Different Circumstances As to Be Easily Distinguishable

The decisions supporting petitioner's position on the question at bar have relied heavily on *Stonite Co.* v. *Melvin Lloyd Co.*, 315 U.S. 561 (1942). Critical examination of *Stonite* shows that it is neither controlling nor seriously persuasive on the question at bar.

We have already shown that a widespread judicial impression that *Stonite* reflected and supported a Congressional policy favoring restrictive venue in patent cases was inaccurate, in every substantial sense. The 1897 Act was not restrictive but liberalizing, at least with respect to the then applicable general venue statute. It would seem that this undercuts the single strongest reason why courts have regarded *Stonite* relevant on the question here.

Furthermore, *Stonite* involved the question whether a section expressed as an exception to a general venue section (the latter being then admittedly inapplicable to patent

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[73] In any case, however, there is internal evidence in the first sentence of § 1391(c) itself which makes possible a distinction of the corporate *plaintiff* situation, if in a proper case that should seem required. It is arguable that "such judicial district" referred back to a district in which a "corporation may be sued," and that "for venue purposes" must be read therewith as meaning in suits against corporations. Professor Moore apparently regarded § 1391(c) as applicable to corporate defendants only, though he was convinced all special venue statutes must be read therewith. "Commentary on the U. S. Judicial Code" (1949), pp. 174, 178, 179.

[74] *Supra*, p. 37.

venue) was applicable to modify a patent venue provision referring to it in no way whatever. In the case at bar the question is not whether § 1400(b) is the exclusive provision governing patent venue, but rather, what is its meaning?

As Judge Clark said in the Court below (R. 6):

> "As was held with respect to earlier legislation, the second provision should control here. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U.S. 561. Even so, that requires but the insertion in it of the definition of corporate residence from the first provision—just as that definition is properly to be incorporated into other sections of the venue chapter, . . ."

In short, the *Stonite* case does not support the proposition that plain statutory language (solidly buttressed by policy and history) should be disregarded.

Finally, *Stonite* was decided under a judicial code including § 294, a rule of construction excluded from the 1948 Code (*supra*, p. 21).

Other Arguments that the 1948 Revision Made Patent Venue Narrower than General Venue Are Also Unsound

We have already dealt with the major arguments used to support petitioner's position. We now turn briefly to other arguments similarly used.

A recurrent argument so used is that to read § 1391(c) with § 1400(b) "would result in partial if not complete emasculation" of the latter. The simple answer to this argument was well stated by Judge Aldrich in *Denis*, 142 F. Supp. 259, 261-262 (D. Mass. 1956):

> "While one may have a partial orchiectomy, 'partial emasculation' is incorrect, both semantically and logically. The fact that a statute may mean less than at first appears is not to say that it is without force. The second clause has a clear purpose where defendant is an individual or a partnership. An interpretation rendering a statute meaningless is, of course, to be avoided, but I know of no doctrine of general construction that requires an unexpressed exception to be read into one section merely to broaden the meaning of another."

See also Judge Clark's remarks to similar effect (R. 11). It is true this construction makes the second alternative of § 1400(b) inapplicable to corporations, but this was necessary unless, with widening by § 1391(c) of general corporate venue, patent venue was for the first time in history to emerge narrower than general. This interpretation makes further sense because it preserves very neatly with respect to individuals and partnerships just the sort of relatively broader venue for patent suits that has been characteristic of our judicial system since the 1897 Act first gave patent venue special treatment. As Judge Clark pointed out, an alternative clause in the Jones Act which raises this same issue has not prevented uniform reading of § 1391(c) therewith (R. 11).

Then it is urged that codifications do not produce any change of law in the absence of "positively expressed Congressional intent to the contrary." (Pet. Br. 10). But the 1948 Judicial Code was a revision, not just a codification; the distinction was emphasized more than once.[75] Secondly, it seems hardly sound to suggest that a "positively ex-

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[75] *Supra*, footnotes 52, 54, pp. 33, 34. See also, H. R. Report No. 308 (Code Cong. Serv. Pamph., p. 1693).

pressed Congressional intent" may not be found in the simple language of the statute. Mr. Justice Jackson's language in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 396 (1951), seems appropos:

> "The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record."

Finally, in addition to arguments previously set forth and applicable here (e.g., with respect to the greater change clearly made in § 1391(c) itself), the choice open is not one between change and no change, but rather between a change in the letter of the pre-1948 rule and a change in the basic sweep of Congressional patent venue policy.

It is argued that a special statute controls a general. But this begs the real question of "what does the special section mean?" See also Judge Aldrich's remarks in *Denis* (142 F. Supp. 259, 262) quoted *supra*, p. 21.

Petitioner urges that reading § 1400(b) with § 1391(c) "violates the plain language of the recodified service of process Section 1694." (Pet. Br. 5, 24-25). But the language of § 1694 takes us no further than that of the second

alternative of § 1400(b):[76] — both make perfect sense as applied to individuals and partnerships, even though no longer meaningful for corporations. Perhaps underlying petitioner's argument is a mistaken assumption, reflected in the heading referring to "Section 1694 Which Controls Service of Process in Patent Infringement Cases . . ." (Pet. Br. 24). Of course, § 1694 is *not* exclusive in patent infringement cases, despite its origin in a common statute with § 1400(b). Process in such cases is proper under either Federal Rule of Civil Procedure 4(d)(3) or 4(d)(7), the latter of which makes applicable even state-authorized procedures. We suggest that the real significance of § 1694 is rather less than support for petitioner's position. For if that section is to be supplemented by provisions in no way referred to, it seems not unreasonable that § 1400(b), with a common origin in the same special statute, be read with a general definition explicitly keyed thereto.

If the Ruling of the Court Below Is Not Upheld, the Case Should Be Remanded with Instructions to Rule on the Question of the Commission of Acts of Infringement in the Southern District of New York

The court below expressly refused to pass on the trial judge's ruling with respect to the absence of local acts of infringement in the Southern District of New York (R. 6). If the Court should disagree with the court below as to the proper interpretation of the first clause of § 1400(b), the decision should not be reversed in its entirety. The case should be remanded with instructions that the Court of Appeals review the ruling of the District Court on this question, since, admittedly, petitioner has a "regular and established" place of business in such district and the

[76] The same is true of elimination from the prior statute of "whether a person, partnership, or corporation" as "surplusage" (Pet. Br. 15, 24). Reviser's notes to § 1400 (Code Cong. Serv. Pamph., p. 1851).

second clause of § 1400(b) would plainly apply if infringing acts occurred.

Conclusion

For the foregoing reasons we submit the judgment below should be affirmed, or, in the alternative, the case should be remanded for further findings as stated above.

Respectfully submitted,
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